

STATE OF MICHIGAN
COURT OF APPEALS

HARRIET LISNOV and CY LISNOV,

Plaintiffs-Appellants-Cross-
Appellees,

v

NABILA SYEDA FAROOQ, M.D., and GLOBAL
PSYCHOTHERAPY, P.C.,

Defendants-Third-Party Plaintiffs-
Appellees-Cross-Appellants,

and

PROVIDENCE HOSPITAL & MEDICAL
CENTERS, INC., d/b/a PROVIDENCE
HOSPITAL,

Defendant,

and

JANSSEN PHARMACEUTICAL PRODUCTS,
L.P.,

Third-Party Defendant.

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this medical malpractice action, plaintiffs appeal the trial court's order granting defendants' motion for reconsideration. The trial court reversed its earlier decision allowing plaintiffs to amend their complaint, and the court also closed the case, incorrectly noting that it had previously granted summary disposition in favor of defendants with respect to all of plaintiffs' original claims. Defendants have filed a cross appeal, arguing that summary disposition of plaintiffs' claims is appropriate because there is no genuine issue of material fact on the issues of informed consent and proximate cause. We affirm in part, and remand in part.

Plaintiffs commenced this action in July 2002, alleging that defendant, Dr. Nabila Farooq, committed malpractice when he prescribed the drug Risperdal to plaintiff Harriet Lisnov without obtaining her informed consent regarding the possible side effects of the drug, and by failing to discontinue the medication in the absence of any demonstrated benefit. Plaintiffs allege that the drug caused Lisnov to develop Tardive Dyskinesia, a condition marked by involuntary muscle spasms.

In May 2004, the trial court granted plaintiffs leave to file an amended complaint, which alleged additional theories of negligence. Plaintiffs did not file an amended affidavit of merit with the complaint. The same day, defendants filed a motion for reconsideration of the trial court's decision allowing plaintiffs to file the amended complaint. Defendants argued that the trial court's decision to allow plaintiffs to file an amended complaint was based on several misunderstandings of fact, that they were prejudiced by the amendment, and that the amended complaint was defective because plaintiffs failed to file an amended affidavit of merit with the complaint. The trial court agreed that the amendment should not have been allowed because defendants were unfairly prejudiced, and it further held that plaintiffs should have been required to file an amended affidavit of merit with the complaint.¹ The court granted defendants' motion, disallowed the amended complaint, and then closed the case.

On appeal, plaintiffs argue that the trial court erred in reversing its original decision allowing them to amend their complaint because defendants did not show a palpable error with respect to the trial court's original ruling.

A trial court's decision regarding a motion for reconsideration is reviewed for an abuse of discretion. *Bergen v Baker*, 264 Mich App 376, 381; 691 NW2d 770 (2004). MCR 2.119(F)(3) provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Although plaintiffs contend that defendants' motion for reconsideration was based on the same arguments they made originally, the court rule does not prevent a trial court from reconsidering arguments previously presented by a party. Rather, the rule only provides guidance to the court. *People v Walters*, 266 Mich App 341, 350; 700 NW2d 424 (2005); *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 722-723; 394 NW2d 82 (1986). "If a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion." *Id.* at 723. Therefore, nothing prevented the trial court from reconsidering its original decision, even if defendants' arguments were the same as those presented originally.

¹ No hearing was held on the motion.

Plaintiffs argue that they should have been allowed to file an amended complaint because defendants were not prejudiced by the amendment. A decision to grant or deny a motion to amend the pleadings is within the sound discretion of the trial court. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). Leave to amend should be freely granted except in cases where, for example, the amendment is brought with undue delay or in bad faith, or would unduly prejudice the opposing party. *Id.* at 658.

Plaintiffs maintain that defendants were not surprised by the requested amendment because plaintiffs' expert, Dr. John Lucas, testified about the new theories at his deposition. However, simply because Dr. Lucas noted these other theories of negligence does not mean that defendants were placed on notice that plaintiffs intended to assert them in an amended complaint, or that defendants would be required to defend against them. *Weymers, supra* at 664-665. Contrary to plaintiffs' contention, defendants did not acknowledge at Dr. Lucas's deposition that plaintiffs would seek an amendment. The record discloses that defense counsel asked Dr. Lucas if his opinion regarding Dr. Farooq's alleged breaches of the standard of care had changed since he signed the affidavit of merit. Dr. Lucas stated that he would add that an adequate history was not taken, to which defense counsel responded, "Well, it may be too late to add that criticism. We'll have to take that up with the Court." Defendants only acknowledged that plaintiffs would have to seek an amendment to pursue the theory, not that plaintiffs were going to seek an amendment.

Moreover, defendants' "knowledge" of the additional theories of negligence was based on an unsigned affidavit of merit that delineated some of the additional theories. This evidence shows that plaintiffs were aware of the additional theories of negligence well before Dr. Lucas was deposed, and even before their original complaint was filed, but did not allege those theories when they filed their original complaint. Plaintiffs never appropriately explained why they did not, or could not, allege these new theories in their original complaint, which was filed 18 months before Dr. Lucas was deposed. Delay, by itself, does not mandate that a motion to amend be denied. *Weymers, supra* at 659. In this case, however, the delay was significant and plaintiffs did not adequately explain the delay. Additionally, defendants had already deposed Dr. Lucas, the discovery period was due to end approximately two weeks after plaintiffs filed their motion to amend, and the trial was scheduled just a month later.² Under the circumstances, the trial court did not abuse its discretion by finding that defendants would be prejudiced if plaintiffs were allowed to amend their complaint to add new theories of malpractice. Because we

² In its order granting defendants' motion for reconsideration, the trial court stated that it was originally mistaken about the status of discovery. The court did not state the date it believed discovery was to close. Plaintiffs' motion for leave to amend was filed on March 19, 2004. Although defendants assert that discovery closed on March 23, 2004, the record discloses that the trial court issued an order, dated March 12, 2004, extending discovery to March 31, 2004. The trial court concluded that defendants would be prejudiced by the amendment because they would be required to conduct additional discovery and plaintiffs presented no explanation for the substantial delay in seeking an amendment.

conclude that the motion to amend was properly denied on this basis, we need not address whether an amended affidavit of merit is required to be filed with an amended complaint.

Before plaintiffs moved to amend their complaint, defendants filed several motions, two of which were motions for summary disposition in which defendants argued: (1) that the evidence did not factually support plaintiffs' claim that Dr. Farooq had not obtained informed consent from Lisnov; and (2) that there was no genuine issue of material fact with regard to whether Dr. Farooq's alleged malpractice proximately caused Lisnov's Tardive Dyskinesia condition. The record discloses that the trial court *denied* these motions. When the trial court subsequently granted defendants' motion for rehearing, however, thereby barring plaintiffs from filing an amended complaint, it dismissed the whole suit, stating, "As the Court has previously ruled that summary disposition was appropriate with respect to Plaintiff's previous claim, this ruling disposes of the entire dispute and closes the case."

We agree with plaintiffs that the trial court erroneously stated that it had previously ruled that summary disposition was appropriate with respect to plaintiffs' claims. Plaintiffs therefore argue that this Court should reverse the dismissal of their original claims and remand for further proceedings on those claims. While defendants have filed a cross appeal in which they specifically challenge the trial court's denial of their motions for summary disposition, we conclude that the prudent course of action is to remand the case back to the trial court for further proceedings in light of the court's inadvertent mistake. We also note that the record is unclear with respect to whether Dr. Trosch can or would testify on proximate cause and whether plaintiffs have produced or could produce other testimony on proximate cause. Again, it is appropriate to remand the case and allow the trial court to address any future efforts on defendants' part to obtain summary dismissal after further development of the record. Additionally, because we are declining to address the summary disposition rulings relative to informed consent and causation, other than to remand the matters, we shall also leave undisturbed the trial court's ruling granting summary disposition in favor of defendants in regard to economic damages. The trial court's actual rulings regarding all issues and aspects encompassed by defendants' motion for summary disposition stand, and we take no position whatsoever concerning the legal soundness of the rulings. The rulings may be subject to later appeal before a different panel should a subsequent appeal arise out of proceedings following our remand. Had the trial court accurately recalled its earlier rulings on defendants' motion for summary disposition, this case would have proceeded below to its natural conclusion without any appeal as of right until the case was indeed properly closed.³ We have chosen to address the issue regarding the amendment of the complaint, treating this case in a fashion similar to granting leave on that particular issue, but choosing not to address the summary disposition rulings. We deem our holding to be consistent with the authority granted this Court under MCR 7.216(A).

³ We note that the lower court record does not contain any document filed by either party calling attention to the error following entry of the court's mistaken order.

Affirmed in part, and remanded in part for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly